STATE OF NORTH CAROLINA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

MECKLENBURG COUNTY

10-EDC-1565

Student, by parent or guardian *Parent*, Petitioners,	)	
v.	)	**FINAL DECISION-ORDER OF DISMISSAL**
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Respondent.	)	

THIS MATTER was heard by undersigned Administrative Law Judge, Selina M. Brooks, on May 6 and May 25-26, 2010 in Charlotte, North Carolina. At the close of Petitioners' evidence, Respondent moved to dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. After careful consideration of the sworn testimony of Petitioners, the exhibits offered and admitted into evidence by Petitioners, and the entire record in this proceeding, and after hearing arguments from counsel for Petitioners and counsel for Respondent, the Undersigned is of the opinion that the above-captioned matter should be dismissed and hereby makes the following Findings of Fact and Conclusions of Law.

APPEARANCES

For Petitioners: Laurie S. Gallagher
Counsel for Children's Rights
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Charlotte, NC 28202

For Respondent: Carolyn A. Waller
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PROTECTIVE ORDER

A Stipulated Protective Order was entered on May 25, 2010 for the purpose of ensuring that matters raised in this proceeding remain confidential and used for the sole purpose of findings in this proceeding alone and are not improperly disclosed in any other setting or hearing to protect the interest of the juvenile who is the subject matter of the within proceeding.

WITNESSES

For Petitioners: *Parent*
Dr. Carol Dunmire
V.G.

EXHIBITS

For Petitioners: 3, 10, 11, 13, 14, 15, 21, 22, 23, 27, 29, 31, 32, 34, 38, 39, and 43

STIPULATIONS

Respondent submitted Proposed Stipulations and Issue For Hearing on May 6, 2010. The stipulations therein were agreed to by the Petitioners, approved by the Undersigned and filed in the Office of Administrative Hearings on May 6, 2010 and are as follows:

1. The parties stipulate that as the party seeking relief, the burden of proof for this action lies with Petitioners. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The parties further stipulate that Petitioners have the burden of proof by the preponderance of the evidence, N.C. Gen. Stat. § 150B-34(a) and that North Carolina statutory law states that actions of local boards of education are presumed to be correct and "the burden of proof shall be on the complaining party to show the contrary." N.C. Gen. Stat. § 115C-44(b).

2. The parties stipulate that the Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* and implementing regulations, 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed.

3. The parties stipulate that the IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301.

4. The parties stipulate that Respondent is a local education agency receiving monies pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1500 *et seq*.

5. The parties stipulate that the controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9 and the corresponding state regulations, including the Policies Governing Services for Children with Disabilities.

6. The parties stipulate that *Student* is a child with a disability for the purposes of the IDEA, 20 U.S.C. §1400 *et seq*. and a child with special needs within the meaning of N.C. Gen. Stat. Chapter 115C, Article 9. Being classified with an Emotional Disability and domiciled in

Mecklenburg County, he is entitled to a free appropriate public education (FAPE) from the Respondent school district.

7. The parties stipulate and agree that each of the exhibits identified by the Petitioner and Respondent are genuine, and, if relevant, material and competent, may be received into evidence without further identification or proof.

ISSUE

The parties consented and the Undersigned accepted the following as the one issue to be decided in this case:

> Whether the Petitioners have demonstrated, by a preponderance of the evidence, that *Student*'s behavior was a manifestation of his disability.

STANDARD OF REVIEW

The North Carolina Rules of Civil Procedure provide, in pertinent part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff[.]

N.C. Gen. Stat. § 1A-1, Rule 41(b).

"When a motion to dismiss pursuant to 41(b) is made, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given to their testimony." *Dealers Specialties, Inc. v. Neighborhood Housing Servs, Inc.*, 305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982). Moreover, in determining the sufficiency of the evidence when ruling on a motion to dismiss made under Rule 41(b), the judge is not bound to make inferences in favor of the plaintiff's (Petitioner's) evidence. *Id.* at 638, 291 S.E.2d at 140. Where the plaintiff's (Petitioner's) evidence shows no right to relief, the defendant (Respondent) is entitled to have its motion to dismiss granted. *Employers Mut. Cas. Co. v. Griffin*, 46 N.C. App. 826, 827, 266 S.E.2d 18, 19 (1980).

After considering the stipulations, weighing all the evidence and assessing the credibility and reliability of the witnesses, the Undersigned makes the following:

FINDINGS OF FACT

1. In making the following findings of fact, the undersigned has considered only the admissible evidence introduced at the hearing. The undersigned has weighed such evidence and has assessed the credibility of the witnesses by taking into account the appropriate and traditional factors for judging credibility, such as the demeanor of the witness, the manner and appearance of the witness, any interests, bias, or prejudice the witness may have, the apparent understanding and fairness of the witness, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other credible evidence in the case. Based upon these standards, the undersigned make the following findings of fact:

2. Minor Petitioner *Student* is an 11-year-old special education student enrolled in the Charlotte-Mecklenburg Schools (CMS). *Student* receives special education services as a child with an Emotional Disability. Ex. 11. During the 2009-10 school year, *Student* attended the sixth grade at J.M. Middle School in a self-contained setting, until he was reassigned to Turning Point Academy in April of 2010 as a result of his conduct on December 10, 2010, which led to a 10-day suspension with a recommendation for long-term suspension or removal. Ex. 43.

3. *Parent* testified that on December 18, 2010, she was called to the office by Dr. Mills, assistant principal of J.M. Middle School, where she was met by several administrators and the School Resource Officer and informed that there was an incident on the after-school bus in which *Student* was alleged to have sexually assaulted a female student. T., 5/6/10, p. 94. She explained on cross-examination that Officer Wilson explained the process of his investigation, that he had spoken to three students involved in the incident and gotten their statements, and that *Student* was alleged to have touched them in an inappropriate way. *Parent* testified that *Student* was provided an opportunity to tell his side of the story. T., 5/25/10, p. 172.

4. *Parent* testified that on that same day, she was told by school administrators at J.M. Middle School that her son was being suspended for this conduct and she was provided a written notice of the recommendation for long-term suspension or removal. Pet. Ex. 43. *Parent* also testified that Officer Wilson did not give her a copy of his police report on December 18, but he did explain to her the process for her to obtain a copy from the police department, and she followed his instructions and did in fact get a copy of his police report shortly thereafter. T., 5/25/10, p. 173.

5. *Student* did not provide a written statement to CMS, nor did he testify at this hearing. T., 5/25/10, pp. 174-75. V.G., *Student*'s private therapist, testified that *Student* told her in private therapy sessions that he was sitting in the back of the bus with his friend when two female students approached him and his friend and started touching them inappropriately. V.G. further testified that *Student* told her he initially tried to slide back in his seat to avoid the contact, but when that didn't work, in an effort to get the girls to stop touching him, he touched them back. T., 5/6/10, pp. 188 and 210-11. *Parent* also testified that *Student* told her the contact was consensual. T., 5/25/10, p. 99, although *Parent* also testified that she did not have enough

information to take the position one way or the other whether the incident was consensual or non-consensual. T., 5/25/10, p. 139.

6. *Student* was suspended on December 18, 2010 for 10 days with a recommendation for long-term suspension or exclusion for violating Rule 27E of the Code of *Student* Conduct, "Sexual Battery." Pet. Ex. 43; *see also* T., 5/25/10, p. 50.

7. On January 14, 2010, an IEP meeting was held for the purpose of determining whether *Student*'s conduct was a manifestation of his disability. At this meeting, *Student*'s behavior for which he was being recommended for long-term suspension or removal was described as "[*Student*] groped two females by touching females body parts inappropriately during the after school YMCA program on the bus ride home." Ex. 14.

8. At this meeting, *Student*'s IEP team determined that his behavior was not a manifestation of his disability. Ex. 14.

9. *Parent* did not agree with the decision of *Student*'s IEP team on January 14, 2010, and on April 7, filed the Petition in this matter challenging the determination that his behavior was not a manifestation of his disability.

10. During her testimony, *Parent* stated that in her opinion, it does not matter whether the incident that day was an act of consensual or nonconsensual sexual contact, but that either way, *Student*'s behavior was a manifestation of his disability because he has a history of making poor decisions, he has low self-esteem, he has anxiety, the incident took place at a time when his medications were wearing off, and he tends to be a follower and will follow the bad examples set by those around him. T., 5/25/10, pp. 138-39. She did not provide testimony about how these behaviors or characteristics could have caused him to grope female students in a sexual manner without their consent, nor did she specifically address how she felt they could cause him to engage in a consensual sexual act as *Student* described the incident to her and to V.G..

11. Dr. Carol Dunmire, a child and adolescent psychiatrist who manages *Student*'s medications, was called as a witness and qualified as an expert witness in child and adolescent psychiatry. T., 5/6/10, p. 133.

12. Dr. Dunmire testified that she diagnosed *Student* with Anxiety Disorder Not Otherwise Specified (Anxiety-NOS), Attention Deficit Hyperactivity Disorder (ADHD), and Oppositional Defiant Disorder (ODD). T., 5/6/10, p. 135. Her testimony included a description of the nature of these disabilities generally and the medications she prescribed for *Student* to address these behaviors.

13. Dr. Dunmire had no direct knowledge as to how the ADHD was manifesting itself with *Student* She stated that *Student* came to her initially with a pre-diagnosis of this disorder that was already being managed through the use of Adderol. T., 5/6/10, p. 143.

14. Dr. Dunmire testified that *Student* received 12-hour extended release Adderol and that she had not received any complaints from his therapist or from *Parent* about the Adderol, so it is her presumption that it has lasted long enough to satisfy everyone. T., 5/6/10, p. 137. She further testified that *Parent* informed her the medication was working sufficiently and there were no complaints from the school or from his private therapist. T., 5/6/10, pp. 143-44.

15. In regard to her diagnosis of Anxiety-NOS, Dr. Dunmire testified that Petitioners did not report many specific symptoms of anxiety and that *Student* did not admit to any symptoms of anxiety. T., 5/6/10, p. 145. Dr. Dunmire testified that *Parent* told her that *Student* has a tendency to withdraw, that he was pulling his hair, and that he has a tendency to avoid tasks. T., 5/6/10, pp. 147-48. She also explained that Anxiety-NOS is a diagnosis that is given to individuals who are exhibiting some symptoms of anxiety but who do not meet all of the criteria of a more specific anxiety disorder. T., 5/6/10, pp. 139 and 146-47.

16. In regard to *Student*'s diagnosis with ODD, Dr. Dunmire indicated that ODD was a diagnosis that was given to him many years earlier but that it was her opinion that the ODD had little impairment in *Student*'s overall functioning. T., 5/6/10, p. 149. She further testified that while he had a history of peer conflicts and fighting, *Parent* informed her that that behavior was much less frequent than it had been previously. T., 5/6/10, pp.149-50. She further indicated that children who fight may not be ODD and the presence of fighting is not a sufficient indicator for ODD. T., 5/6/10, p. 150.

17. Dr. Dunmire has never reviewed *Student*'s educational records, nor spoken with anyone at CMS about his behavior at school. T., 5/6/10, p. 151. The only information she had about the type of behaviors he was exhibiting in school came from his mother, nor did she review his recent psychological evaluation. T., 5/6/10, p. 152. She provided no testimony about the incident for which *Student* was being recommended for removal, and she provided no testimony on the issue of whether the conduct in question was caused by, or had a direct and substantial relationship to, his disability.

18. Petitioners submitted a written letter from Dr. Dunmire, but this letter likewise did not address the issue of whether the conduct in question was caused by or had a direct and substantial relationship to, his disability. Pet. Ex. 39.

19. In addition to Dr. Dunmire, Petitioners also called V.G., a child clinical psychologist and *Student*'s private therapist, as a witness. V.G. was accepted as an expert witness in clinical psychology specializing in children. T., 5/6/10, p. 177.

20. V.G. testified that she met with *Student* in July of 2009, diagnosed him, and developed a service plan. She further testified that she saw him two additional times from July through November, 2009. T., 5/6/10, p. 195.

21. V.G. testified that *Student* presented in July 2009 as a very anxious child but provided little testimony as to his symptomology. T., 5/6/10, p. 179. She stated that he was

pulling out his hair but not in sufficient quantities to warrant a diagnosis of trichotillimania. T., 5/6/10, p. 179. On cross-examination, she initially stated that she had no recollection of how the anxiety was presenting other than the pulling of his hair. She later recalled that *Student* also presented as a child who was "very tense" with "tight, pulled up, tense muscles" and that this could be another symptom of generalized anxiety. T., 5/6/10, pp 208-09. She testified that she diagnosed him with generalized anxiety, even though she was aware that Dr. Dunmire did not feel he met the criteria for generalized anxiety. T., 5/6/10, pp. 207-08. There was no further testimony from V.G. regarding the manner in which anxiety was or was not manifesting itself in *Student*

22. In regard to *Student*'s ADHD diagnosis, V.G. indicated *Student* came to her with symptoms of shaking his legs, moving his hands, difficulty focusing on what was being discussed in the initial meeting, and that *Student* reported he had difficulty focusing in school, paying attention to his teacher, sitting still in class, getting his work done, and being organized. T., 5/6/10, p. 199. On cross-examination, she indicated that *Student* discussed with her his impulsivity in the classroom manifesting itself in a lack of focus. T., 5/6/10, p. 205. She further indicated that he also reported that there were times he would get out of his seat and that he lacked organization. T., 5/6/10, p. 206. She also stated that he might engage in horseplay at school that involved some light touching. T., 5/6/10, p. 210. She provided no further testimony about how the ADHD might be manifesting itself in *Student* through impulsive actions or tendencies, other than this was a topic of discussion between herself and *Parent*

23. V.G. testified that *Student* was prescribed Adderol extended release, which he took in the mornings. She indicated that this medication was designed to last 12 hours, but it is rare for patients to report its effectiveness as lasting a full 12 hours. V.G. indicated that when the medication begins to wear off, the individual would begin to exhibit the symptoms of ADHD that are typical for that child. T., 5/6/10, p. 183. There was no specific testimony about whether the medication wore off earlier for *Student* or how his symptoms appeared at the time the medication was wearing off.

24. In terms of his ODD diagnosis, V.G. testified that *Student* had a history of ODD but was not oppositional at the time she was seeing him from July through December of 2009. T., 5/6/10, p. 179.

25. V.G. testified that the incident on December 10, 2009, for which *Student* was removed from school and is the subject of this hearing, occurred at a time when his medications had probably worn off and that there was "a likely connection" between the conduct and his difficulty controlling his impulses and the way he is very anxious, if she were to presume that the contact between *Student* and the female student was consensual. T., 5/6/10, p. 190. When asked if she felt if his conduct, if consensual, was because of his disabilities or because he's just an adolescent boy, she responded the disability was a contributing factor as opposed to a causal one. T., 5/6/10, p. 211. This testimony was not supported by any additional testimony by V.G. that provided any further basis or explanation as to why she believed his medications were wearing off, that he had difficulty controlling his impulses, or that any anxiety he was feeling

contributed to decisions he made that afternoon.

26. V.G. provided no testimony that she felt the behavior, if consensual, was caused by, or had a direct and substantial link to, his disabilities. She further provided no testimony of any kind as to whether the behavior, as described as a nonconsensual sexual incident, was caused by, or had a direct and substantial link to, his disability.

27. The only other witness to testify on behalf of Petitioners was *Parent* who testified at length regarding *Student*'s past history and aggressive behaviors prior to third grade, including hospitalizations and enrollment in day treatment programs. As part of this testimony, she discussed the significant and substantial improvements that *Student* experienced over time with his behaviors.

28. *Parent* testified that *Student* has been enrolled in CMS since his pre-kindergarten years, when he received services at ABC Elementary School in 2003. During that first year, *Parent* testified that he was hospitalized twice for behaviors that included pushing other students, turning over furniture in the classroom, throwing classroom papers, and other similar behaviors that were described generally as aggressive and explosive. *See generally* T., 5/6/10, pp. 35-56.

29. In September of 2003, the beginning of his kindergarten year, *Student* was admitted to Behavioral Health Center, CMC-Randolph for persistent aggressive and assaultive behavior both at school and in the classroom. Ex. 29 p. 3; T., 5/6/10, p. 36. He was diagnosed at that time with Mood Disorder, NOS and Attention Deficit Hyperactivity Disorder as Axis I diagnoses. Ex. 29 p. 3.

30. *Parent* testified that *Student*'s behavior continued to be aggressive, unpredictable, explosive, and destructive in kindergarten, first and second grades. At some point during this time, he was placed in a day treatment program to help manage his behaviors. T., 5/6/10, p. 41. During this period, he was not physically aggressive at home, but he exhibited defiance, required re-direction, and would run out the front door on occasion, necessitating a call to the police department to obtain their assistance in finding and bringing *Student* back home. T., 5/6/10, p. 45.

31. *Parent* testified that *Student* was identified as special needs at some point during kindergarten or first grade and received services at the resource level, whereby he received specialized instruction outside of the regular classroom in his core subjects and other instruction in a standard classroom with his nondisabled peers. There was no testimony or evidence admitted indicating his classification at this time. T., 5/6/10, p. 40.

32. There was no testimony offered or presented that asserted a causal relationship, or a direct and substantial relationship, between the conduct exhibited by *Student* in his early school years and the behavior of *Student* that led to his recommendation for long-term suspension or removal.

33. *Parent* testified that at the start of third grade, *Student* was assigned to XY Elementary School in a self-contained classroom. This was the first time that *Student* received services in this setting. *Parent* testified that *Student*'s behaviors improved significantly once he began receiving services in the self-contained setting. T., 5/25/10, p. 21.

34. Upon entering the third grade, *Student*'s IEP contained eight distinct behavior goals. Ex. 21. Mid-way through third grade, some of those goals were no longer needed and the IEP was changed, with the consent of *Parent*, to contain only 5 behavior goals. Ex. 22. By fifth grade, *Parent* testified that with the extra support available through the self-contained classroom program, *Student* no longer required multiple behavioral goals and his IEP was changed to include only one behavioral goal. T., 5/25/10, pp. 31 and 35.

35. *Student* began sixth grade at J.M. Middle School in August of 2009. T., 5/6/10, p. 67. He was placed in Ms. J.A.'s self-contained classroom. *Parent* testified that Ms. J.A.'s class was very structured with class rules posted on the wall, daily communication logs that came home, and near daily communications by either telephone, e-mail, or text messages between *Parent* and Ms. J.A.. *Parent* described her relationship with Ms. J.A. as positive, and Ms. J.A.'s relationship with *Student* and all the students as very positive and supportive. T., 5/6/10, pp. 69 and 75.

36. *Parent* also testified at various times about the behaviors *Student* exhibited during the current school year prior to this incident on December 10, 2009. During her testimony, *Parent* reviewed the daily behavioral sheets prepared by Ms. J.A. from August 2009 through December 2009. Many of the behaviors reflected on the data sheets revolved around not completing homework, avoiding work in school, noncompliance with the teacher, and defiance with the teacher. *Parent* testified that there were other aggressive behaviors that were exhibited but not reported on these sheets. She explained that when she used the term "aggressive" she included any behavior that required re-direction. She confirmed she included non-compliant and oppositional behavior in her definition of "aggressive." In support of her position that other behaviors were present but not reported, she discussed one incident that necessitated a referral to an administrator. She did not recall the specifics of this incident, but confirmed it did not lead to a written referral. She also discussed an incident where *Student* drew a picture of Ms. J.A. and *Parent* described this act as an aggressive act. She did not provide specifics of the picture or the words, but stated it was threatening and should have been reported, and it would have led to a finding of a violation of the code of conduct.

37. *Parent* provided no testimony as to how she felt the behaviors contained in the behavioral logs, or the other behaviors that she testified about but were not contained in those logs, supported her position that *Student*'s conduct on December 10, 2010 was caused by or was directly and substantially related to, his disability.

38. *Parent* spent some time testifying about what she felt were failings on the part of the IEP team when it met on January 14, 2010 to determine manifestation. On cross-examination, *Parent* testified that Ms. J.A., *Student*'s special education teacher, was present in

the office on December 18, 2010 and she heard oral statements made by those present that described the incident as a sexual assault. *Parent* further testified that at the manifestation meeting on January 14, 2010, there was discussion at that meeting about the fact that the incident was described as a sexual incident. *Parent* testified that she objected to the use of the word "sexual" and advocated for it to be replaced with the descriptor "inappropriate" touching and that in some places, this change was made. On cross-examination, *Parent* acknowledged that she was aware the incident was one in which *Student* was being alleged to have committed a sexual assault, but that she objected to the use of the word "sexual" in the manifestation paperwork because in the written notice she received on December 18, it stated "inappropriate touching" as opposed to "sexual touching" or "sexual assault."

39. Despite her objections to the reference to "sexual" or "sexual touching" and the use of the word sexual at the manifestation meeting, *Parent* testified that she was aware from the beginning that the conduct for which he was being subject to disciplinary action was sexual assault. She explained that she was aware at the time of the manifestation meeting that *Student* was being suspended for sexual misconduct and that the behavior had been described to her by Officer Wilson the day of his initial suspension. She did not testify or provide any insight into how this verbiage debate was related to her claims that the IEP team acted inappropriately in finding manifestation.

40. *Parent* also alleged that the IEP team met ahead of time and pre-determined the outcome of the manifestation meeting. In support of this allegation, *Parent* testified that the draft paperwork was drawn up ahead of time and used the word "sexual." At the same time, she also testified that the IEP team worked off of the draft and made changes as they went along, and that the IEP team had previously worked off of draft documents at previous IEP meetings. Other than the use of the word "sexual" in the draft documents, she offered no other evidence of predetermination.

41. *Parent* testified on direct examination that her attempts to discuss the psychoeducational evaluation were rebuffed at the January 14, 2010 manifestation meeting. T., 5/25/10, pp. 181-82. However, she also testified that team members Ms. M., his regular education teacher, and Ms. J.A., his special education teacher, were a part of recent IEP meetings at the end of November 2009 that included a complete review of his psychological evaluation and the creation of his new IEP. T., 5/25/10, pp. 35-36. *Parent* testified that both Ms. M. and Ms. J.A. were familiar with his IEP and the psychological evaluation, and while the team did not look specifically at the evaluation, they were familiar with it and discussed some points it contained. She further testified that one thing the evaluation addressed that she felt was important was the fact that his medication was wearing off, and she explained that she discussed this issue with the team at the meeting in January. She testified that she felt the fact that he was rated as below average in the area of verbal reasoning was an indication that he had lower reasoning/functioning skills, that his below average score is evidence of a disability, and that this should have been discussed by the team. However, she provided no testimony that she shared this concern with the team or that she asked the team to review his level of verbal reasoning and that her request was denied or rejected.

42. *Parent* also testified that in late November 2009 *Student*'s IEP team met to conduct the annual review of *Student*'s IEP and to make changes and create a new IEP for the next 12 months. Ms. M., Ms. J.A., and *Parent* also attended this meeting. *Parent* testified that Ms. J.A. and Ms. M. were familiar with his IEP and the goals it contained. T., 5/25/10, p. 35.

43. *Parent* also alleged in her direct examination that the IEP was not reviewed at the manifestation meeting in January, 2010. T., 5/6/10, p. 110. Rather than review the IEP, she explained that the team mainly focused on "discussing the incident that happened on the bus and how it would or would not be directly related to his disability." T., 5/6/10, p. 110. *See also* T., 5/6/10, pp. 115-17. She also testified that Ms. M. and Ms. J.A. were two of the four team members who wrote and created the IEP just a few weeks earlier and were familiar with its content, and they were also present at the meeting in January.

44. At the January 14, 2010 meeting, the team issued a DEC 5 Prior Written Notice that indicated the team rejected a finding of manifestation because the behavior in question was not addressed in the current IEP. Pet. Ex. 15.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*., and implementing regulations, 34 C.F.R. Part 300.

2. Respondent is required under federal and state law to make special education and related services available to *Student* and to offer him a free appropriate public education (FAPE).

3. Under IDEA, the burden of proof in an administrative hearing is properly placed on the party seeking relief. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this instance, Petitioner is the party seeking relief and therefore bears the burden of proof.

4. *Student*'s behavior is a manifestation of his disability only if "the conduct in question was caused by, or had a direct and substantial relationship to, [*Student*'s] disability, or if the conduct in question was the direct result of [CMS]'s failure to implement the IEP." 34 CFR § 300.530(e).

5. Evidence submitted by Petitioners also did not establish that the behavior of *Student* was caused by, or had a direct and substantial relationship to his disability.

6. Petitioners neither asserted nor produced evidence that CMS failed to properly implement *Student*'s IEP, and as such, Petitioners have not met their burden in demonstrating *Student*'s behavior is a manifestation of his disability as a result of the district's failure to

implement his IEP.

7. The evidence does not establish that *Student*'s conduct is a manifestation of his disability.

8. Petitioners have not sustained their burden of proof that *Student*'s conduct was a manifestation of his disability.

9. The North Carolina General Assembly assigned responsibility for conducting special education due process hearings to the Office of Administrative Hearings (OAH). The OAH conducts those hearings arising out of the IDEA and State law in accordance with N.C.G.S. § 115C-109.6 *et seq.* and N.C.G.S. § 150B-23 *et. seq*. There is also a Memorandum of Understanding between the North Carolina State Board of Education, through the Department of Public Instruction, Exceptional Children Division and the North Carolina Office of Administrative Hearings.

10. The IDEA specifically provides for two approaches to administrative challenges. A parent is entitled to "an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f)(1)(A). If the state elects to allow the local educational agency to conduct the due process hearing, it must provide for an appeal to the state educational agency. *Id.* § 1415(g)(1). If the due process hearing is held by the state, no appeal is required. The former system is often referred to as a two-tiered system, while the latter is known as a one-tiered system." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

11. "North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. Therefore, in North Carolina, in which the hearing is conducted by the state and appealed to a state review official, the state review official's decision is considered the official position of the state educational agency. *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

12. A court must try to give meaning to all provisions of a statute and additionally to consider the intent of the legislature when creating the statute. *Wilkins v. North Carolina State University*, 178 N.C. App. 377, 379, 631 S.E.2d 221, 223 (2006). A court should not construe a statute in such a way that renders part of it meaningless. Id. at 380-81, 631 S.E.2d 224. Policy reasons for passing the statute as well as the history of the legislation are also helpful when interpreting. *Electric Supply Co. of Durham, Inc. v. Swain Electric Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294-95 (1991).

13. In accord with N.C.G.S. § 150B-34, the administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the

agency for a final decision. Harmonizing the provisions of § 150B with § 115C so as "not rendering any part of them meaningless," and in light of the above cited case law, should a decision in special education matters be appealed to a state review officer (who renders the official position of the state education agency), then N.C.G.S. § 150B-36 shall apply. This is further consistent with Paragraph 8 of the Memorandum of Understanding which states: "The decision of the review officer is limited to whether the evidence presented at the OAH hearing supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with 20 USC § 1415, 34 CFR §§ 300 and 301; GS 115C; the Procedures; and case law. The review officer must also consider any further evidence presented to him or her in the review process."

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that all of Petitioners' claims are DISMISSED with prejudice.

NOTICE

The North Carolina Department of Public Instruction has notified the Office of Administrative Hearings that a Final Decision based on an Order of Dismissal is not subject to appeal to the North Carolina Department of Public Instruction.

Pursuant to the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order. N.C. GEN. STAT. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Pursuant to N.C. GEN. STAT. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal.

In the alternative, any person aggrieved by the findings and decision of this Final Decision, Order of Dismissal may institute a civil action in the appropriate district court of the United States as provided in Title 20 of the United States Code, Chapter 33, Subchapter II, Section 1415 (20 USC 1415). Procedures and time frames regarding appeal into the appropriate United States district court are in accordance with the aforementioned Code cite and other applicable federal statutes and regulations. A copy of the filing with the federal district court should be sent to the Exceptional Children Division, North Carolina Department of Public Instruction, Raleigh, North Carolina so that the records of this case can be forwarded to the

court.

This the 8th day of June 2010.

/s/
Selina M. Brooks
Administrative Law Judge

A copy of the foregoing was sent to:

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This the 8th day of June, 2010.

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